No. 82-756

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ESTATE OF CLINTON T. FROCK, deceased; and CHARLES L. STRIBLING,

Petitioners,

vs.

UNITED STATES RAILROAD RETIREMENT BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the reduction in petitioners' Railroad Retirement benefits, effected pursuant to 45 U.S.C. §231b(h)(6), violated

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* Clinton T. Frock, petitioner below in No. 81-2187, died on August 28, 1982, twenty-two days after the decision of the Court appealed from and one day after the mandate issued. See Rule 41(a), F.R.App.P. On or about October 12, 1982, a motion was

(cont. p. ii)

the due process clause of the Fifth Amendment by depriving them of procedural due process and by denying them the guarantees of equal protection.

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* cont.

filed in the Court of Appeals to substitute his wife, Loretta Frock, as his personal representative. See Rule 43(a), F.R.App.P; App. D. On October 21, 1982, petitioner's counsel was informed orally by personnel from the clerk's office of the Court of Appeals that the motion had been rejected because that Court no longer has jurisdiction over petitioner Frock's case. No state court probate proceedings have been instituted because there was no property to be probated. Consequently, there is neither an administrator nor an executor appointed to administer his estate.

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OPINION BELOW

The opinion of the Court of Appeals on both of the Petitions for Review filed below, Seventh Circuit Nos. 81-2187 and 81-2637, which is reported at 685 F.2d 1041, appears as Appendix A. The final decision of the Railroad Retirement Board in the Appeal of Charles L. Stribling is attached as Appendix B. (There is no final decision of the Board for petitioner Frock.)

JURISDICTION

The decision of the Court of Appeals was filed on August 6, 1982. This petition for certiorari is being filed within 90 days of the filing of that decision. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES

The following statutes relevant to the consideration of this petition are set out verbatim in Appendix C:

45 U.S.C. §231b(h)(3)
45 U.S.C. §231b(h)(4)
45 U.S.C. §231b(h)(6)
45 U.S.C. §231b(m)

STATEMENT OF THE CASE

1.a. The Railroad Retirement Act of 1974 (the "1974 Act"), 45 U.S.C. §231 et seq., and its predecessor, the Railroad Retirement Act of 1937, 45 U.S.C. §228 et seq., established a system for the payment of benefits to retired railroaders, their dependents, and survivors. See generally Hisquierdo v. Hisquierdo, 439 U.S. 572, 573-574 (1979). Its structure has historically permitted workers insured under both the Railroad Retirement Act and the Social Security Act to recover larger total benefits than they would have received had they worked for the same total period of time under just one Act or the other. See U.S. Railroad Retirement Board v. Fritz, 101 S.Ct. 453, 456 & n.1 (1980). As this payment of so-called dual benefits was a factor in the increasingly heavy financial burden on the Railroad Retirement Fund, Congress undertook to phase out -- but not eliminate -- dual benefits. See id., at 456-457. This was accomplished by continuing to recognize the rights of those already receiving dual benefits and the rights of those whose work history

established them as vested prior to the effective date of the 1974 Act, January 1, 1975. See id., at 457-458.

Achievement of this end was effected through sections 3(h) and 3(m) of the Act, 45 U.S.C. §§231b(h), (m). Pursuant to the latter, railroad retirement benefits are reduced by the amount of Social Security benefits which the retiree receives. That amount is restored, however, pursuant to §3(h), if the individual satisfies the work-related criteria of any of its first four sub-sections, 45 U.S.C. §231b(h)(1)-(4).[1/] See generally Gebbie

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1/ Subsections (1) and (2) are directed at retirees whose entitlement to Social Security benefits is based on their own work records. See Fritz, 101 S.Ct., at 457. Subsections (3) and (4), at issue in this case, concern those whose Social Security eligibility derives from their spouses' work in Social Security-covered employment. See Gebbie v. U.S. Railroad Retirement Board, 631 F.2d 512, 513-514 (7th Cir. 1980). As the Court noted in that case, "both sections [(3) and (4)] raise the same problems of interpretation." Id., at 513 (footnote omitted).

v. U.S. Railroad Retirement Board, 631 F.2d 512, 513 (7th Cir. 1980). In short, Congress' goal was accomplished through a complementery recognition that dual benefits should be ultimately eliminated, but that already vested rights should be preserved and recognized. Id., at 515.

b. In March, 1977, this Court held that provisions of the Social Security Act requiring husbands and widowers, but not wives and widows, to demonstrate "dependency" on the wage earner in order to be eligible for spousal benefits were unconstitutional.[2/] As a consequence, men became equally eligible for Social Security spousal benefits based on the work of their wives and deceased wives.

This Court's Goldfarb determination meant that many male former railroaders were eligible to receive Social Security

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2/ Califano v. Goldfarb, 430 U.S. 199 (1977); Califano v. Silbowitz, 430 U.S. 924 (1977); Califano v. Jablon, 430 U.S. 924 (1977); Califano v. Abbott, 430 U.S. 924 (1977). These cases will hereafter be referred to collectively as "Goldfarb."

spousal benefits. The Board was responsible for administering payment of these benefits, 45 U.S.C. §231f(b)(2); it also undertook to reduce railroad retirement benefits by the amount of Social Security benefits that these men were now receiving. 45 U.S.C. §231b(m). The Board also had to consider whether these men were entitled to have their railroad benefits restored to their full amount under 45 U.S.C. §231b(h)(3), (4). Each of those provisions requires that railroad benefits will be increased by the amount to which the former railroader "would have been entitled ... under the provisions of the Social Security Act as in effect on December 31, 1974 ...."

On the basis of the "as in effect language," the Board concluded that these men, estimated at between 20,000 to 50,000,[3/] were not entitled to a restoration of their full railroad benefits. See Gebbie, 631 F.2d, at 514.

3/ Answer to Interrogatory No. 3(a), dated June 19, 1978, in Gebbie v. Chamberlain, No. 78-1030 (C.D.Cal.).

c. Three former railroaders challenged this interpretation in federal district court as contrary to the statute, and, alternatively, unconstitutional. Gebbie v. Chamberlain, No. 78-1030 (C.D. Cal., filed March 17, 1978). The parties stipulated to the facts, including that the three individuals would be entitled to dual benefits but for the Board's interpretation of the challenged provisions. They also stipulated that the case, as alleged by plaintiffs, was proper for certification as a class action under Rule 23(b)(2), F.R.Civ.P., but agreed that formal certification should be witheld pending the court's determination of dispositive motions.

On cross-motions for summary judgment and to dismiss, the district court agreed with defendants, dismissing on the grounds that the plaintiffs had failed to exhaust administrative remedies and that 45 U.S.C. §§231g and 355(f) provided the sole basis for judicial review. The court held that only the appellate courts had jurisdiction to review Board decisions. The three plaintiffs then sought administrative

review, received the inevitable final decision from the Board denying their claims for dual benefits and refusing their request for a classwide determination, and filed a petition for review in the Seventh Circuit. Gebbie v. U.S. Railroad Retirement Board, No. 79-1978 (7th Cir., filed Aug. 27, 1979). Significantly, they styled their joint petition for review as "on behalf of themselves and all others similarly situated," and moved for class certification. That motion was denied by a single judge of the Court, who stated that the appellate court "was an inappropriate forum in which to request class certification." Gebbie v. U.S. Railroad Retirement Board, No. 79-1978 (7th Cir., order of Oct. 17, 1979). In their briefs on the merits, however, petitioners reasserted their class claims, and the issue was discussed at oral argument.

In its decision, the Court of Appeals agreed with petitioners that the Board was misinterpreting the "as in effect" language:

> "It is difficult for the Board to take the position that Congress intended this language to have the extraordinary effect of insulating the Social Security component of Railroad Retirement benefits against the 'change' brought about by Goldfarb, for an unconstitutional law is 'in legal contemplation, as inoperative as though it had never passed.'" Gebbie, 631 F.2d, at 516 (citations omitted).

The Court concluded that, as the wives of the petitioners had satisfied all of the work-related requirements to render their husbands eligible for Social Security spousal benefits by the effective date of the 1974 Act, they were vested at that time and were entitled to dual benefits. Id., at 516.

The Court again refused, however, to certify a class, concluding that "this court is not an appropriate forum for such an action." Id., at 516 n.9.

The Board did not seek review of the decision, and restored the three beneficiaries to dual benefit status, including payment of those benefits previously offset. The Board refused, however, to pay

any other affected former railroaders, asserting that its obligations under Gebbie were limited to the three individual petitioners. Thus, despite the Seventh Circuit's determination that its interpretation was wrong, the Board continued to apply subsections 3(h)(3) and (4) to deny dual benefits to the remaining thousands of men in this situation.[4/]

2.a. Clinton Frock worked for 44 years for the St. Louis-San Francisco Railroad. He retired in 1968 at the age of 65; he was 79 years old when he died. He was eligible for and received an annuity under the Railroad Retirement Act of 1974.

His wife worked for 20 years in Social Security-covered employment, and was eligible for and received a benefit under the Social Security Act. She is now 72 years old.

4/ One other individual obtained a final decision from the Board denying his claim, filed a petition for review with the Seventh Circuit, and received an order requiring the Board to pay him dual benefits. Shuff v. U.S. Railroad Retirement Board, No. 80-2791 (7th Cir., April 9, 1981).

After the Goldfarb decision, Mr. Frock received a notice from the Board regarding his future receipt of Social Security and Railroad Retirement benefits. The notice indicated that he would "probably continue to receive the same total amount each month as you did before you became entitled to Social Security benefits." In February, 1981, after the Gebbie decision was final, Mr. Frock requested the Board to reinstate his full benefits; this request was denied, with the Board's attorney stating that the "Board is not applying the Gebbie case on a class basis." Mr. Frock then filed a petition for review on July 27, 1981.

b. Charles L. Stribling worked in the railroad industry for 36 years for railroad retirement purposes, retiring in 1974 from the Seaboard Coastline Railroad Company at the age of 65. He is now 73 years of age. His wife worked for more than 20 years in Social Security covered employment, and was eligible for and received a benefit under the Social Security Act. She is now 72 years old.

By letter dated December 28, 1978, Mr. Stribling was notified regarding the effect of Goldfarb and the Board's interpretation of section 3(h). He timely filed an appeal from the decision of the Board's Bureau of Retirement Claims on October 11, 1979; on May 27, 1980, the referee affirmed the initial decision. He appealed that decision to the Board on September 22, 1980, and contended, inter alia, that the Gebbie decision was controlling. Ten months later, in a letter dated July 27, 1981, the Board reaffirmed the denial of his claim, stating that it was adhering to its policy of denying dual benefits to persons such as Mr. Stribling and that it would not follow the decision reached in Gebbie. See App. B. He filed his petition for review on October 15, 1981.

3. On August 13, 1981, after Mr. Frock had filed his petition for review and after Mr. Stribling had received his final decision from the Board, President Reagan signed the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), Pub.L. No. 97-35, 95 Stat. 357 (1981). Section 1118(e)(3) of the OBRA, 95 Stat. 631-632, added a new subdivision to

subsection 3(h) of the Railroad Retirement Act. That new subdivision, codified at 45 U.S.C. §231b(h)(6), reads in its entirety:

> "No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to August 13, 1981."

But for this amendment to the statute, petitioners would have been entitled to an order from the Court of Appeals reversing the Board's denials of their claims for dual benefits. See, e.g., Shuff, supra. Because the Court of Appeals did not rule on Mr. Frock's petition prior to August 13, 1981, and because the Board did not rule favorably on Mr. Stribling's claim prior to that date, the effect of §3(h)(6) was to deprive them of benefits to which, as the Court of Appeals had previously determined in Gebbie, they, and thousands of others, were entitled. The issue raised by their petitions, therefore, became the application and constitutionality of subdivision 3(h)(6).

In its decision, the Court of Appeals

rejected all of petitioner's arguments. First, it held that the language of 3(h)(6) explicitly precluded payment of dual benefits "unless an individual has been determined to be eligible by the date of enactment." App. A, at 15A (emphasis in original). A "specific determination of entitlement" before August 13, 1981 was necessary. Ibid. Since Gebbie was not certified as a class action, the Board was not bound to apply that case to other than the individuals involved. Id., at 16A. Moreover, the Court held, the failure of the Board to seek review of Gebbie in this Court did "not have the effect of setting a nationwide agency standard." Ibid. Consequently, "the agency was bound to comply with this court's decision only with regard to" the Gebbie petitioners. Id. at 19A.

The Court also rejected petitioner's argument that the new divesting provision violated due process: "To condition dual benefits upon when entitlement is determined does not seem to us to be so unreasonable as to constitute a denial of due process." Id., at 21A. Noting that, in its judgment, petitioners had offered

no authority directly on point for their contentions, the Court found a recent decision by this Court inapposite. Unlike that case, Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982), this was an instance, the Court observed, where "there is no procedure which ... was denied...." Id., at

Finally, the Court rejected petitioner's claims that the provision violated the guarantees of equal protection by "grandfathering in" the Social Security Act provisions found unconstitutional in Goldfarb. Section 3(h)(6) was facially gender-neutral, the Court reasoned, App. A, at 26A, and was "clearly explainable in terms of a non-discriminatory purpose." Id., at 29A. Therefore, it lacked any "invidious gender-based discriminatory purpose." Id., at 31A-32A.

The Court of Appeals thus affirmed the Board's decision to deny dual benefits, upholding subsection 3(h)(6) of the Act.

REASONS FOR GRANTING THE WRIT

I. SECTION 3(h)(6) CONFLICTS WITH THIS COURT'S DECISION IN LOGAN v. ZIMMERMAN BRUSH CO. AND REPRESENTS AN EXTRAORDINARY VIOLATION OF PUBLIC POLICY WHICH SHOULD BE CORRECTED BY THIS COURT

In restructuring the Railroad Retirement Act in 1974, Congress had several options for resolving the perceived difficulties created by the numerous railroaders whose doubly-insured status entitled them to dual benefits.[5/] It could have eliminated dual benefits altogether. Or it could have limited them to individuals already receiving them. It chose, instead, to rest eligibility on vested status and on

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5/ By the year 2000, it is estimated that nearly 48 per cent of all railroaders will have sufficient credits to be covered under both Acts, and would therefore have been eligible for dual benefits under the pre-1974 Act. H.Doc. No. 92-350, 92d Cong., 2d Sess. 22 (1972). Consequently, the issue was not one involving a few isolated railroaders with a "lucky" work background. Dual coverage was and is a common factor for railroaders and former railroaders.

other indicia demonstrating a special relationship with the railroad industry. See S.Rep. No. 93-1163, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Admin. News 5702, 5710, 5711; see also Fritz, 101 S.Ct., at 461.

Furthermore, Congress could have maintained dual benefits only for former workers who themselves had worked sufficiently to be covered under both Acts, eliminating dual benefit coverage for those whose Social Security entitlement derived from their spouses' work efforts. It did not select this option either, deciding instead, via 45 U.S.C. §231b (h)(3), (4) to recognize the Social Security coverage of these former railroaders as well.

Implicit in Congress' decisions, therefore, was a recognition that, once a railroader and spouse had satisfied appropriate work-related criteria, they were entitled to enjoy the full range of benefits available from the Social Security and Railroad Retirement Acts. Whatever savings had to be effected, Congress determined, would derive from those whose entitlement had not yet vested. Consequently, as the starting point for analysis, there must be

the recognition that Congress sought to protect vested rights and that the men divested by section 3(h)(6) are no less deserving of having their rights protected than are any others eligible for dual benefits. See Gebbie, 631 F.2d, at 516.

In light of this background, the actions of the Board, and of Congress in passing section 3(h)(6), take on special significance. This is not an instance where Congress has simply reduced benefits or eliminated a program. In this case, Congress has taken advantage of the Board's demonstrated stubbornness, coupled with the procedural peculiarities of the Railroad Retirement Act, to divest one classification, consisting of thousands of men, of benefits which they, or their representatives, have been seeking for years. The violation of due process in this instance is extraordinary precisely because the statute utilized the powerlessness of the affected claimants, and the intransigence of the responsible agency, to divest them of benefits to which they were already entitled.

Petitioners Frock and Stribling are

members of a class which, as the Board agreed four years ago, should have been certified. Because of a strict reading of the jurisdictional provisions of the Act, however, the issue could not be joined on the merits in the district court. On the other side of the coin, the inability to obtain class certification in an appellate court stymied the second effort to resolve the substantive issue on a classwide basis. The next step in the claimants' ordeal was the Board's refusal to apply the interpretation mandated by an appellate court. Petitioners' frustrating effort received its final blow in the passage of section 3(h)(6).

Significantly, that provision does not attempt to "correct" subsections 3(h)(3) and (4); rather, it utilizes the Board's past failure to correctly apply the statute as a means to negate vested entitlement.[6/]

6/ The Board's refusal to correctly apply the statute contradicts its statutory obligation: "The Board shall have and exercise all the duties and powers necessary to administer this subchapter. The Board shall take such steps as may be necessary (cont. p. 19)

Congress eliminated benefits not for those who had failed to meet certain work-related criteria, or who were not entitled; instead, it hinged eligibility on whether entitlement had been determined. The reasons that entitlement had not been determined were beyond the control of the claimants. These reasons are: (1) procedural hurdles precluding class certification; and (2) the Board's refusal to apply the statute correctly. Men affected by the challenged provision made every conceivable effort to obtain full and final review of their claims, but were prevented by procedural problems beyond their control.

Still, the court below states that

6/ cont.

to enforce such subchapter and make awards and certify payments." 45 U.S.C. §231f(b)(1). This mandatory duty requires the Board to take affirmative steps, and does not permit it to employ only those procedures and interpretations with which it agrees; the Board's obligation is to carry out the legislative mandate. Accord Califano v. Yamasaki, 442 U.S. 682, 693-694 & n.9 (1979).

"condition[ing] dual benefits upon when entitlement is determined does not seem to us to be so unreasonable as to constitute a denial of due process." App. A, at 21A. Yet, the Court would undoubtedly agree that, at some point, the Board has an obligation to make that determination. The statute is explicit on this point. See 45 U.S.C. §231f(b)(1), (3). Moreover, the Board itself has conceded that delay in ruling on a claim is itself a violation of due process. Kelly v. U.S. Railroad Retirement Board, 625 F.2d 486, 491 (3d Cir. 1980). If delay is a violation of due process, then the outright refusal to apply a statute correctly must represent a similar violation. And, where that refusal receives institutionalized approval by incorporation into a later statute, then the due process violation is enhanced.

Significantly, section 3(h)(6) is also not relevant to the saving of finite resources, as the Court of Appeals stated. App. A, at 22A. Congress dealt with that issue separately, by setting a limit on the total amount of dual benefits that can be paid out in a given year. That amount is

established and allocated separately by Congress each year, and is not tied to the general fund. Consequently, the number of dual beneficiaries cannot affect the fiscal soundness of the system. See 45 U.S.C. §231n(d), as added by Pub.L. No. 97-35, §1124, 95 Stat. 639 (1981).

The Court below noted that petitioners were unable to cite explicit support for their position. App. A, at 23A. Petitioners readily concede that there is no precedent on this issue; research has disclosed no previous instance when Congress divested beneficiaries by incorporating the unconscionable action of the responsible agency. As another appellate court observed in a different context involving the procedural irregularities of a federal agency: "[This] resembles more a scene from Kafka than a constitutional process." Gray Panthers v. Schweiker, 652 F.2d 146, 168 (D.C.Cir. 1980).[7/]

7/ The effect of §3(h)(6) on Mr. Stribling assumes a particularly ironic tone in light of the Court's determination below that exhaustion was futile and

(cont. p. 22)

Petitioners did raise to the Court of Appeals, however, this Court's recent decision in Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982). The decision below rejected its applicability on the grounds that that case involved the failure to provide a statutorily required procedure, while, in this instance, "there is no procedure which the petitioners claim was denied them." App. A, at 23A. The Court has misconstrued petitioners' position, however, and misunderstood the relevance of Logan to this situation.

7/ cont.

unnecessary. See App. A, at 11A. Had Mr. Stribling taken the short-cut, and sought judicial review immediately, he would have undoubtedly had his entitlement determined prior to August 13, 1981. But because he reasonably followed the express statutory requirement of exhaustion, which one court had determined was a jurisdictional predicate to judicial review, Gebbie v. Chamberlain, supra, he did not receive a final decision from the Board (pre-ordained to be adverse) until just a few weeks before the passage of section 3(h)(6) -- and nearly two years after he contested the initial decision. In short, the administrative review procedure designed to guarantee that claimants receive due process was itself responsible for his divestment.

Logan involved the one-time failure of a state officer to hold a hearing within the statutorily mandated time period. The instant situation is on a considerably larger scale, but the effect is essentially the same. The petitioners in this case were also effectively denied a hearing. First, the Board refused to comply with its obligation to award benefits to beneficiaries, by ignoring the mandate of subsections 3(h)(3) and (4). Secondly, Congress institutionalized that action by establishing the date of the determination of entitlement -- a determination which the responsible agency refused to make -- as the definitive factor for the payment of benefits.

Logan involved one person deprived of a hearing because of negligence. This issue involves thousands of men deprived of vested benefits because of an affirmative decision by the responsible agency not to pay benefits, coupled with a legislative determination that that action -- the decision not to follow the statute -- will itself serve as the basis for divestment. The petitioners here, like Mr. Logan, were

deprived of a procedure: the right to have their benefits determined pursuant to statute.

If, in Logan, officials of the Illinois Fair Employment Practices Commission had decided, perhaps because of a reduced budget, that an arbitrary number of hearings would not be scheduled within the statutorily mandated time period, thereby depriving the selected individuals of a hearing, would that have been any less a violation of due process than the single incidence of negligence which did occur? Yet, that, in essence, is what happened in this case, with the additionally egregious factor that the decision of the agency officials not to provide the procedure (i.e., a determination of entitlement) mandated by statute was retroactively legitimized by Congress.

Logan directs public officials to provide the procedures which the statute requires, and precludes them from denying those procedures for reasons unrelated to the actions of the claimant. In this case, on a broad, institutional basis, public officials have refused to comply with their

statutory mandate -- through no fault of the petitioners, who met all of the eligibility conditions for vested entitlement and who have been seeking a determination of entitlement for years. That Congress has incorporated the actions of these officials as a means to forever deprive these petitioners of their benefits does not validate that action. The statutory divestment of an entitlement, due solely to the intentional refusal of public officials to comply with a statutory mandate, does not distinguish this case from Logan; it represents instead a more egregious version of it.

The Court should grant the petition, therefore, in order to review the unique and exceptional action of Congress in repudiating a vested entitlement by the creation of a retroactive eligibility condition which was beyond the control of the claimants, and which negated vested entitlement by institutionalizing the improper action of a federal agency. Furthermore, the decision of the Court of Appeals significantly conflicts with a

recent decision of this Court.[8/]

II. SECTION 3(h)(6) FOLLOWS DIRECTLY FROM THE UNCONSTITUTIONAL DEPENDENCY PROVISIONS OF THE SOCIAL SECURITY ACT AND THEREBY CONFLICTS WITH GOLDFARB

The Court below determined that the challenged provision was facially gender-neutral, App. A, at 26A, and applied the analysis outlined in Personnel Administrator of Massachusetts v. Feeney, 442 U.S.

8/ In addition, section 3(h)(6) creates two classifications of otherwise eligible dual beneficiaries: those whose entitlement was determined before August 13, 1981 and those determined later. The disfavored classification is deprived of a vested entitlement for reasons unrelated to the purpose of the Railroad Retirement Act; the differential treatment discriminates for no valid reason and thus fails to satisfy the rational basis test. Again, as in Logan, the use of an arbitrary procedural dividing line, over which claimants have no control, to divest claimants of their established rights, is violative of equal protection guarantees. See Logan, 102 S.Ct., at 1159 (Blackmun, J., separate plurality opinion on equal protection), and 1161-1162 (Powell, J., concurring in plurality opinion on equal protection).

256 (1979), to conclude the provision did not discriminate on the basis of sex. But this case is factually distinguishable from Feeney, and that analysis has little or no bearing. Unlike that case, this is an instance in which the legislature has intentionally sought to camouflage a gender-based classificatory scheme.

The Board's interpretation of sections 3(h)(3) and (4) incorporated the dependency provisions of the Social Security Act and is therefore unconstitutional. The Court of Appeals did not expressly determine that in Gebbie, but it strongly implied that the Board's interpretation was unconstitutional. The Court below recognized as much: "[T]he [Gebbie] court suggested that this application was contrary to Goldfarb." App. A, at 25A.

Thus, in the absence of 3(h)(6), the statute would unquestionably be unconstitutional. The Board argued, and the Court of Appeals agreed, however, that 3(h)(6) effectively purges those provisions of their gender-based taint by creating a scheme based solely on the date on which entitlement was determined. This approach

however, ignores the explicit purpose and actual effect of 3(h)(6) and views that section as if it were in a vacuum, unrelated to sections 3(h)(3) and (4) and the unconstitutional provisions of the Social Security Act. In effect, it allows the blatantly unconstitutional treatment of intended beneficiaries of Goldfarb to be swept under the rug.

The Court of Appeals urges that the purpose of 3(h)(6) was to protect the fiscal soundness of the railroad fund, citing U.S. Railroad Retirement Board v. Fritz, 101 S.Ct. 453 (1980). App. A, at 31A. While it is correct that that was the purpose of the provisions challenged in Fritz, see 101 S.Ct., at 456, that was not the purpose of this provision. As previously noted, another part of OBRA, section 1124, established a separate fund for the payment of dual benefits, for which Congress makes a separate appropriation each year, and that provision operates to prevent dual benefits from adversely affecting the Railroad Retirement Fund. Regardless of whether the class of men affected by 3(h)(6) receives

benefits, there will be no impact on the Fund.

The legislative history discloses, however, that the express purpose of section 3(h)(6) was to foreclose the payment of dual benefits to the men who were eligible under the Gebbie analysis. H.Conf. Rep. No. 97-208, 97th Cong., 1st Sess. 862-863 (1981), reprinted in [1981] U.S. Code Cong. & Admin. News 1010, 1225-1226. That discussion leaves no doubt that section 3(h)(6) had one goal: to divest those men who, in the opinion of the Board, were never entitled to benefits in the first place under 3(h)(3) or (4). These men are, of course, exactly the same men who were expected to benefit from Goldfarb. The effort was undertaken by couching 3(h)(6) so that the divestiture was premised on the date of entitlement, not on the sex of the worker or his spouse. But this approach was merely camouflage for the true purpose and effect of 3(h)(6).[8/]

8/ That 3(h)(6) was intended to perpetuate unconstitutional provisions while appearing gender-neutral is apparent from its original version, which was so

(cont. p. 30)

The Seventh Circuit further concluded that section 3(h)(6) did not in fact discriminate on the basis of sex because "[t]he class of persons who will be excluded from dual benefits under this section will be composed of men and women. Similarly, the class of persons who will receive benefits will be comprised of men and women." App. A, at 30A (footnote omitted). This conclusion, however, ignores reality and controlling legal precedent.

The Court first notes that there are men not adversely affected by §3(h)(6); they are those who met the dependency test

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8/ cont.

blatantly unconstitutional in its reliance on the Social Security Act provisions that it was rewritten to eliminate the blemishes. It states: "Notwithstanding any other provision of law, no amount shall be payable under subdivision (3) or (4) of this subsection to any individual who does not meet the requirements for a wife's, husband's, widow's, or widower's benefit under the Social Security Act as it was in effect and being administered on December 31, 1974, unless such amount was awarded prior to June 1, 1981." H.R. No. 3982, §6903(e)(5), reprinted in 127 Cong.Rec. H3980 (June 26, 1981).

and those "who successfully challenged the Board's interpretation in court." App. A, at 30A n.16. It is entirely irrelevant that some men satisfied the unconstitutional dependency provision; the same was true in Goldfarb, and that was not a saving factor for the provision there challenged. And it is ludicrous to premise the legitimacy of §3(h)(6) on the fact that four men were able to press their claims successfully prior to the effective date of the provision. Surely the fact that some people were able to force the Board to interpret the statute correctly does not form the basis for upholding a provision which incorporates the Board's incorrect and unconstitutional interpretation of the statute.

It is equally inaccurate to premise its legitimacy on the fact that some women will be deprived of dual benefits pursuant to section 3(h)(6). The percentage of women who will be affected by this section -- those whose entitlement was not determined by August 13, 1981 -- is so small, so minuscule, as to be de minimis. If the structure settled upon by Congress to

accomplish the divestment of the men in the putative Gebbie class can satisfy equal protection guarantees merely by having an adverse effect on a tiny percentage of women, then virtually any otherwise discriminatory provision could be saved from invalidation by the expediency of including a few of the other sex among those affected.

First, only 6.6 per cent of all railroaders are women. H.Doc. No. 92-350, supra, at 87-88. Secondly, that number is significantly reduced because, prior to August 13, 1981, all otherwise eligible women would have had their entitlement determined by the Board, for the Board found women eligible for dual benefits under sections 3(h)(3), (4) without regard to dependency. Thus, the only women deprived of dual benefits by 3(h)(6) are those who retired either after that date, or so shortly before it that their entitlement could not be determined in time. Significantly, the further in the future from January 1, 1975 -- the effective date of the 1974 Act and the date by which all railroaders seeking dual benefits had to have met the vesting

requirements under the Social Security and Railroad Retirement Acts, see 45 U.S.C. §231b(h)(1)-(4) -- the fewer the number of recipients who will be retiring with sufficient credits to be vested under both Acts. Consequently, most of those who were or should have been eligible under §3(h)(3), (4) had already retired before implementation of §3(h)(6), so that the overwhelming percentage of women potentially affected by §3(h)(6) had retired and had had their entitlement determined before they could be affected by that provision.

In sum, there was a finite number of railroaders who, as of December 31, 1974, could possibly retire with dual benefits based on the Social Security insured status of their spouses. Only one in sixteen of this finite group was female. In addition, in the more than six years between the effective date of 3(h)(3) and that of 3(h)(6), many of these women retired and were found eligible. Thus, in the period after August 13, 1981, an increasingly smaller percentage of the finite group of women vested on December 31, 1974 are affected.

The purpose of section 3(h)(6) was to

negate the entitlement of men which Gebbie had conclusively established under sections 3(h)(3) and (4). Under the Board's interpretation, those latter sections were unconstitutional due to their incorporation of the invalid dependency provisions of the Social Security Act. Section 3(h)(6) further incorporates the Board's interpretation of those sections; its effect on a de minimis percentage of women cannot disguise its history, purpose and effect. Section 3(h)(6) is merely one more layer of camouflage over the provisions of the Social Security Act which this Court found unconstitutional five years ago.

The Court below has, in effect, upheld a provision which was invalidated in the Goldfarb cases. That decision should be reviewed.

CONCLUSION

For the reasons presented, a writ should issue to review the decision of the Seventh Circuit.

Respectfully submitted,

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DATED: October, 1982

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 81-2187 and 81-2637
CLINTON T. FROCK and CHARLES L. STRIBLING,

Petitioners,

vs.

UNITED STATES RAILROAD RETIREMENT BOARD,

Respondent.

On Petitions to Review Orders of
the Railroad Retirement Board.

ARGUED FEBRUARY 12, 1982 —
DECIDED AUGUST 6, 1982

Before SPRECHER* and BAUER, Circuit Judges, and BONSAL, Senior District Judge.**

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* Circuit Judge Robert A. Sprecher heard oral argument, participated in the conference which followed, and voted to affirm. He died May 15, 1982, and did not participate in the preparation or approval of this opinion.

(cont.)

BAUER, Circuit Judge. These petitions involve the applicability of section 3(h)(6) of the Railroad Retirement Act, 45 U.S.C. section 231b(h)(6), to railroad workers applying for dual benefits following this court's decision in Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (7th Cir. 1980), and the constitutionality of that section if it is applied to these workers. Because we find that section 3(h)(6) was correctly applied and is constitutional, we uphold the Railroad Retirement Board's decisions denying dual benefits to the petitioners.

I

Clinton T. Frock and Charles L. Stribling (collectively "petitioners") are retired railroad workers entitled to annuities under the Rail-

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** Honorable Dudley B. Bonsal, Senior District Judge for the Southern District of New York, is sitting by designation.

road Retirement Act of 1974, 45 U.S.C. section 231 et seq ("RRA"). Both men are married to spouses who were fully insured under the Social Security Act, 42 U.S.C. section 301 et seq., prior to January 1, 1975. Social security benefits and railroad retirement annuities are distributed to railroad workers and their families by the Railroad Retirement Board ("Board"). 45 U.S.C. section 231(b)(2).

In 1977, Frock and Stribling became eligible to receive spousal social security benefits as a result of the Supreme Court's decision in Califano v. Goldfarb, 430 U.S. 199 (1977). There the Court held that a provision in the Social Security Act requiring husbands, but not wives, to prove dependency on their insured spouse in order to receive spousal social security benefits violated the Fifth Amendment. In response to Goldfarb, the Board provided all workers with spousal social security benefits. This action was based on 45

U.S.C. section 231b(m), which precludes "dual" or "windfall benefits to retired railroad workers; the Board considered the receipt of both a railroad retirement annuity and spousal social security benefits to constitute such "dual" or "windfall" benefits.[1] The Board then read 45 U.S.C. sections 231b(h)(3) and (4) to mandate the restoration of dual benefits to female railroad retirees and male railroad retirees able to prove dependency upon their

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[1] 45 U.S.C. section 231b(m) provides:

The annuity of any individual under subsection (a) of this section for any month shall ...be reduced, but not below zero, by the amount of any monthly benefit...payable to that individual for that month under title II of the Social Security Act [pertaining to federal old-age, survivor, and disability insurance benefits].

Spousal social decurity benefits are "windfall benefit. when disbursed to railroad retirement annuity recipients because railroad retirement annuities are already subsidized by Social Security Act funds. S.Rep.No. 93-1163, 93d Cong., 2d Sess. 2-3, reprinted in [1974] U.S.CODE CONG. & AD. NEWS 5702, 5708.

wives. Under those sections, persons whose spouses were "permanently insured under the Social Security Act on December 31, 1974" were to receive an increase in annuity benefits equal to the social security benefits to which they "would have been entitled ... under the provisions of the Social Security Act as in effect on December 31, 1974." Thus, those who were entitled to dual benefits in 1974 would still be entitled to them. The Board interpreted "as in effect on December 31, 1974" to mean that eligibility for dual benefits was to be based on social security eligibility standards in effect before the Supreme Court's 1977 Goldfarb decision.

This court, in Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (7th Cir. 1980), held that the Board's interpretation of this eligibility standard was incorrect. Although not reaching any constitutional issues,

we found that it was improper to read 45 U.S.C. sections 231b(h)(3) and (4) as evincing a design to base receipt of dual benefits upon the dependency requirements invalidated in Goldfarb. We declined, however, to certify a class in Gebbie, so that only the petitioner there became entitled to collect dual benefits.

Following Gebbie, Frock sent a letter to the Board on February 27, 1981, requesting dual benefits in light of that decision. Frock had been denied the benefits in 1977. On March 18, 1981, the Board sent Frock a letter in which it refused to reopen his administrative claim on the basis that Frock had failed to file a timely administrative complaint after the 1977 denial of benefits. See 45 U.S.C. section 231g. Frock then filed a Petition for Review with this court on July 27, 1981.

Stribling had filed a timely objection when he was denied dual benefits in 1978, and

was pursuing his administrative remedies at the time of the Gebbie decision. One year after Gebbie, however, by a letter dated July 27, 1981, Stribling was notified that his appeal had been denied. The Board's letter stated that it had declined to apply Gebbie to any other cases. Having exhausted his administrative remedies, Stribling filed his Petition for Review with this court on October 15, 1981.[2]

While Frock's petition was pending before this court, and shortly after the Board's final disposition of Stribling's claim, Congress

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[2] Under 45 U.S.C. section 231g, decisions of the Board are subject to court review as provided under the Railroad Unemployment Insurance Act, 45 U.S.C. section 351 et seq. That Act permits petitioners to file suit in the court of appeals for the circuit in which they reside, in the District of Columbia Circuit, or in the Seventh Circuit. 45 U.S.C. section 355(f).

added section 3(h)(6) to the RRA.[3] This section eliminated dual benefits for anyone whose entitlement to those benefits had not been "determined" by August 13, 1981. Section 3(h)(6) forms the basis of the dispute in this case. The Board asserts that this provision bars the claims at issue here, because in neither case has the peitioner been determined by a court or by the Board to be entitled to dual benefits. The petitioners argue that the provision does not apply to them because their positions are indistinguishable from that of the plaintiff in Gebbie, and therefore that Gebbie determined their entitlement to dual benefits. In the alternative, they argue that section 3(h)(6) is unconstitutional.

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[3] 45 U.S.C. section 231b(h)(6). This section provides:

No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to August 13, 1981.

II

Initially, we face a jurisdictional question. Although the Board concedes that Stribling's claim is properly before this court, the Board argues that this court lacks jurisdiction over Frock's claim because of Frock's failure to exhaust his administrative remedies and his lack of timeliness in filing a claim. We reject both these contentions, and find that Frock has properly invoked this court's jurisdiction.

The Board contends that, despite the fact that the Board unequivocally denied dual benefits to Frock, he was nevertheless required to pursue his administrative remedies before bringing this action. Under the regulations in effect when Frock's annuity benefits were first reduced, Frock was authorized to appeal any adverse decision by the Board through an extensive administrative appeals system.

20 C.F.R. sections 260.2, 260.3 (1977). Failure to file a final administrative appeal forfeited any right to further review of the decision. 20 C.F.R. section 260.3(c) (1977). These regulations continue in effect today. 20 C.F.R. sections 260.4, 260.6 (1982). Finally, section 8 of the RRA provides for court review of Board decisions "only after all administrative remedies within the Board will have been availed of and exhausted." 45 U.S.C. section 231g (incorporating section 5(f) of the Railroad Unemployment Insurance Act, 45 U.S.C. section 355(f)). Frock, however, did not begin to seek review of the Board's denial of dual benefits to him until 1981, and that administrative process has never been completed. Thus, the Board argues, this court lacks jurisdiction over Frock's claim because Frock has failed to exhaust his administrative remedies.

We disagree. First, Frock's case falls within an exception to the general exhaustion rule for cases in which exhaustion would have been "a futile gesture." Porter County Chapter of Izaak Walton League of America, Inc. v. Costle, 571 F.2d 359, 363 (7th Cir.), cert. denied, 439 U.S. 834 (1978). Here, the Board clearly indicated in a letter to Mr. Frock's counsel that "[t]he Board is not applying the decision in the Gebbie case on a class basis," meaning that the Board did not consider anyone in Frock's position to be entitled to dual benefits under 45 U.S.C. sections 231b(h)(3) and (4). Under such circumstances, pursuing administrative "remedies" would indeed have been a futile gesture.

Furthermore, courts have not required parties to exhaust administrative remedies where the purposes of exhaustion would not be served. "The basic purpose of the exhaus-

tion doctrine is to allow the administrative agency to perform functions within its special competence--to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Continental Can Co. v. Marshall, 603 F.2d 590, 597 (7th Cir. 1979). Accord, Weinberger v. Salfi, 422 U.S. 749, 765 (1975). None of these purposes would be served by requiring exhaustion here. There is no need for development of a factual record, for the facts are not in dispute. No application of agency expertise is involved, and a formal decision by the Board not to follow Gebbie effectively precludes the Board from mooting the controversy.[4]

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[4] Although it is conceivable that Frock could persuade the Board to change its policy, we believe that to require exhaustion in the face of a clearly contrary Board decision would be a waste of administrative resources. See Weinberger v. Salfi, 422 U.S. 749, (cont.)

The Board argues, however, that even if Frock was not required to exhaust his administrative remedies, this court still lacks jurisdiction because Frock failed to protest the Borad's action within the statutorily required time period. The Board argues that, under 45 U.S.C. section 231g, Frock was required to object to the reduction of his annuity within one year of the date it was reduced. Thus, the Board argues, Frock's failure to protest his annuity reduction within one year of September 1977, the date the Board decided to reduce his annuity, precludes any further review of the Board's actions.

Once again, we disagree. At the very least, Frock is entitled to bring this action as an appeal from the Board's refusal to rein-

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4 (cont.)
765-66 (1975); Continental Can Co. v. Marshall, 603 F.2d 590, 596-97 (7th Cir. 1979).

state his annuity benefits after Gebbie. Frock's letter of February 27, 1981, requested reinstatement of his reduced annuity, which the Board permits pursuant to 20 C.F.R. section 200.1(vi) (1981). When the Board, by its letter of March 18, 1981, refused to reinstate Frock's benefits, Frock timely filed his Petition for Review with this court. Thus, Frock's case is properly before this court.[5]

III

A

Frock and Stribling claim that this court's decision in Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (7th Cir. 1980), established their right to dual benefits. They argue, therefore, that section 3(h)(6), which prohibits dual payments "to an individual ... unless the entitlement of such individual to such amount" was determin-

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[5] Because of the decision we reach herein, we need not address the more difficult question raised by Frock of whether the Board's

ed before August 13, 1981, simply does not apply to them.

Section 3(h)(6) specifically precludes dual benefits unless an individual has been determined to be eligible by the date of enactment. Such language clearly contemplates a specific determination of entitlement.[6]

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5 (cont.)
Initial letters provided sufficiently clear notice of the reasons for terminating his annuity.

6
This meaning is clear from the discussion of the section in the Report of the Conference Committee on the Budget Reconciliation Act. In explaining the Senate version of section 1118(e), which was ultimately adopted by Congress as section 3(h)(6), the Committee explained:

> The senate amendment addressed the Gebbie issue by providing that no new windfalls would be payable in connection with annuities awarded after May, 1981, or the enactment date, to any employee based on a spouse's Social Security Act employment. The intent of the provision "unless entitlement of such individual to such amount had been determined prior [sic] the date of the enactment of this subdivision" is to cut off windfall awards in all cases

Neither Frock nor Stribling had received such a determination by August 13, 1981, and therefore section 3(h)(6) does indeed operate to block dual benefits for them.

Frock and Stribling appear to read Gebbie as a class action, determining the rights of all those similarly situated. Yet this court specifically declined to certify a class in Gebbie on the ground that this court was "not an appropriate forum for such an action." 631 F.2d at 516 n.9. Thus, Gebbie decided only the entitlement of the individual petitioner in that case.[7]

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6 (cont.)
where the processing has, for whatever reason, not been completed and the determinations have not been made.
H.R. REP. NO. 97-208, 97th Cong., 1st Sess. 863, reprinted in [1981] U.S. CODE CONG. & AD. NEWS 1010, 1225 (emphasis added).

7 Thus, in order to reap the benefits of the Gebbie decision, workers had to bring either individual or class actions. One individual did appear before this court, where his entitlement to dual benefits was deter-
(cont.)

Frock and Stribling, however, place great weight upon the fact that the Board did not appeal the Gebbie decision. The failure to do so, they allege, bound the Board to apply Gebbie in all cases. An unappealed circuit court decision concerning agency action, however, does not have the effect of setting a nationwide agency standard. Federal appellate courts can, and do, differ in their conclusions as to the law affecting agency action. See Davis v. Califano, 603 F.2d 618, 627-28 (7th Cir. 1979) (differing with Second Circuit's opinion in Rosenberg v. Richardson, 538 F.2d 487, 490 (2d Cir. 1976), as to entitlement to certain types of social security benefits). Due to the nature of the statutory grant of jurisdiction in this

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7 (cont.)
mined, Shuff v. United States Railroad Retirement Board, No. 80-2791 (7th Cir. Apr. 9, 1981)(unpublished order), and a class action is pending before the district court, Forseth v. United States Railroad Retirement Board, No. 81-C-3742 (N.D.Ill.).

case, a petitioner could bring an action in any one of three circuits.[8] To find that this circuit's determination governed the Board's actions in all other circuits would be to make this circuit the ultimate decisionmaker simply because it was the first court presented with the issue.[9] We do not believe that the Board's decision not to appeal Gebbie dictates such a conclusion. We are unaware of any decision requiring an agency to either appeal

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[8] See note 2, supra.

[9] Because petitioners could appeal Board decisions in any one of three circuits, the Board had no way of determining which circuit would ultimately review its decision in any individual case. Thus, the nature of the jurisdictional grant under the RRA serves to distinguish this case from those in which lower courts have imposed a duty upon agencies to apply the rulings of the court to all cases within that court's geographic jurisdiction. See, e.g., Flores v. Secretary of Health, Education & Welfare, 228 F.Supp. 877, 878 (D.P.R. 1964)(decision of a particular court must be obeyed by an agency within that court's jurisdiction absent modification or reversal of that decision).

a circuit court's holding or accept it as binding on the agency in all circuits where review could have been sought. Thus, the scope of this court's Gebbie decision was necessarily limited to the rights of the litigant in that case, and the agency was bound to comply with this court's decision only with regard to that litigant.

B

Having found that section 3(h)(6) was properly applied to Frock and Stribling, we reach the petitioners' constitutional challenge that the statute violates the Fifth Amendment guarantees of due process and equal protection.[10] First, Frock and Stribling contend that the statute violates due process by conditioning receipt of dual benefits upon an external occurrence unrelated to eligibility --certification of entitlement by the Board

[10] While the Fifth Amendment does not explicitly guarantee equal protection, courts have recognized that the Amendment includes (cont.)

or a court. Second, Frock and Stribling argue that the statute violates equal protection by perpetuating the differential proof of dependency requirement declared unconstitutional in Califano v. Goldfarb, 430 U.S. 199 (1977).

1

The petitioners claim that resting eligibility for benefits upon the time when a person's entitlement to those benefits has been determined by a court or the Board violates due process. This is impermissible, say the petitioners, because it conditions their right to benefits upon when the Board or a court acts affirmatively upon their request for bene-

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10 (cont.)
an equal protection component prohibiting discrimination that is "so unjustifiable as to be violative of due process." Schneider v. Rusk, 377 U.S. 163, 168 (1964) (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

fits, rather than upon when they became eligibile for benefits.

To condition dual benefits upon when entitlement is determined does not seem to us to be so unreasonable as to constitute a denial of due process.[11] "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program ..., we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification." Califano v. Goldfarb, 430 U.S. 199, 210 (1977) (quoting Flemming v. Nestor, 363 U.S. 603, 611 (1960)).[12] Here,

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[11] Because Gebbie did not decide the entitlement of nonparties to that case, we reject the petitioners' characterization of the Board's refusal to apply Gebbie to their cases as "illegal action."

[12] "[R]ailroad benefits, like social security benefits, are not contractual and may be al- (cont.)

Congress, faced with a system in severe financial distress, sought to put a final end to dual benefits. See H.R. REP. NO.97-208, 97th Cong., 1st Sess. 863, reprinted in [1981] U.S. CODE CONG. & AD. NEWS 1010, 1224. Faced with our Gebbie decision, which threatened to impose significant financial burdens upon the railroad retirement system, Congress declared that any employees, male or female, whose entitlement to dual benefits had not been decided by the enactment date would not receive them. The decision not to revoke the benefits of those who had been determined to be eligible for them was a rational means of recognizing expectations created by court decisions and Board actions. Consideration of such expectations is a legitimate concern of Congress. See

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12 (cont.)
tered or even eliminated at any time." United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174 (1980). See Hisquierdo v. Hisquierdo, 439 U.S. 572, 575 (1979).

United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 178 (1980).

The petitioners cite no support for the proposition that hinging the right to dual benefits upon a determination of entitlement violates due process. Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982), is inapposite. There, the Court held that where a state official failed to conduct a statutorily mandated procedure, due process was violated. Here, however, there is no procedure which the petitioners claim was denied them. Rather, the petitioners object that a procedure was required before benefits would vest.[13] We therefore find no violation of due

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[13] The petitioners suggest that the Board took an excessive amount of time in processing their applications. We note, however, that the petitioners do not claim that the Board deliberately delayed action on their applications in anticipation of the passage of section 3(h)(6). Nor is there any evidence in the record to support this conclusion. Unfortunately, the Board has apparently had (cont.)

process in Congress' decision to condition the receipt of dual benefits upon whether or not the petitioners' entitlement to benefits had been determined as of the date that section 3(h)(6) was enacted.

2

Frock's and Stribling's equal protection claims rest upon their characterization of section 3(h)(6) as an attempt to "grandfather in" an interpretation of 45 U.S.C. sections 231b(h)(3) and (4) which was violative of the Equal Protection Clause. Section 3(h)(6)

[13 (cont.)
considerable difficulty in processing claims on a timely basis, so that the two-year period between the filing of Stribling's application and its final denial does not seem unusual. See, e.g., Kelly v. Railroad Retirement Board, 625 F.2d 486 (3d Cir. 1980) (more than three years to process disability claim); Parker v. Railroad Retirement Board, 441 F.2d 460 (7th Cir. 1971) (dependents' disability application pending for over six years).

precludes dual benefits for anyone whose eligibility had not been determined by August 13, 1981. Thus, those entitled to dual benefits under the statute are persons who were eligible for dual benefits under the Board's interpretation of 45 U.S.C. sections 231b(h)(3) and (4), and those who successfully litigated their entitlement in court. The Board's interpratation was that pre-Goldfarb standards were to be applied to establish eligibility. As we noted above, the Gebbie court never decided the constitutionality of this application of sections 231b(h)(3) and (4), but the court suggested that this application was contrary to Goldfarb. Frock and Stribling argue that because section 3(h)(6) permits this application to stand, it violates equal protection by discriminating on the basis of gender.[14] Such a result, however,

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[14] The Supreme Court has noted that a social insurance system under which women receive

is not supported by equal protection analysis.

Numerous cases enunciate the strict standard to be applied to statutes which are explicitly gender-based. See, e.g., Kirchberg v. Feenstra, 450 U.S. 455 (1981); Califano v. Webster, 430 U.S. 313 (1977); Craig v. Boren, 429 U.S. 190 (1976). These cases, however, fail to provide guidance for our analysis here. Section 3(h)(6) is, on its face, gender-neutral. It simply states that if an individual has not been determined to be eligible for dual benefits by the date of the section's enactment, then that person

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14 (cont.)
more in spousal benefits than men acts to discriminate against women. Califano v. Goldfarb, 430 U.S. 199, 208 (1977). This result stems from the fact that systems such as social security base benefits paid upon the contribution of the wage-earner. Thus, when women receive more than men in spousal benefits, it means that the contributions of men have purchased more benefits than the contributions of women. Id.

cannot receive a windfall benefit. Thus, we must determine whether section 3(h)(6) operates in practice to violate equal protection.

The Supreme Court explained the proper method of analyzing a facially neutral statute for equal protection violations in Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). There, the Court upheld a statute which, though neutral on its face, operated "overwhelmingly" in favor of males by providing employment benefits to veterans who had at least one day of "wartime service." Id. at 269. The Court enunciated a "a twofold inquiry:"

> The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based

> discrimination .... In this second inquiry, impact provides an "important starting point,"... but purposeful discrimination is "the condition that offends the Constitution."

Id. at 274 (citations omitted) (quoting Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971)). In determining whether a law is covertly gender-based the Court suggested looking to the purposes of the statute. However, "[i]f the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral." Id. at 275. In Feeney the Court found that the purpose was the neutral one of rewarding veterans for service to their country. Thus, the Court ruled, "this is not a law that can plausibly be explained only as a gender-based classification. Indeed, it is not a law that can

rationally be explained on that ground." Id. The Court noted that, while the beneficiaries of the statute were overwhelmingly male, many women were covered, and many men were not covered.

Similarly, the statute here is clearly explainable in terms of a non-discriminatory purpose. By enacting section 3(h)(6) Congress sought to eliminate dual benefits while ensuring continued benefits to those who had been receiving such benefits. H.R. REP. NO. 97-208, 97th Cong., 1st Sess. 863, reprinted in [1981] U.S. CODE CONG. & AD. NEWS 1010, 1225.[15] Indeed, section 3(h)(6) cannot

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[15] This attempt to continue dual benefits to those already receiving them is consistent with long-stated policy under the RRA. "[C]utting off the benefits of those already receiving or legally entitled to them would clearly be inequitable. These individuals have a right to receive those benefits the law has led them to rely upon or expect." S. REP. NO 93-1163, 93rd Cong., 2d Sess. 4, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 5702, 5705.

rationally be explained as an effort to discriminate on the basis of gender. The class of persons excluded from dual benefits under this section will be composed of men and women. Similarly, the class of persons who will receive benefits will be composed of men and women.[16]

Having determined that section 3(h)(6) is indeed gender-neutral, we must look to "whether the adverse effect [of the statute] reflects invidious gender-based discrimination." In order to establish invidiousness, petitioners must show "that a gender-based discriminatory purpose has, at least in some measure, shaped the ... legislation."

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[16] Benefits will be provided to men and women who met the eligibility requirements as interpreted by the Board—married or widowed men who were able to prove dependency upon their spouses and all married or widowed women, and men who successfully challenged the Board's interpretation in court.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 276 (1979). In proving discriminatory purpose, the petitioners must establish "more than intent as volition or intent as awareness of consequences." Id. at 279. Rather, they must establish "that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. Here, however, the legislative history is clear that Congress passed section 3(h)(6) not in an attempt to discriminate against anyone on the basis of sex, but rather in an attempt to forestall bankruptcy of the railroad retirement system by eliminating dual benefits for both men and women. United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 169 n.2 (1980). The petitioners, therefore, have failed to establish that Congress passed section 3(h)(6) with an "in-

vidious gender-based discriminatory purpose." Thus, because section 3(h)(6) passes the two-tier analysis enunciated in Feeney we find no violation of the Fifth Amendment's guarantee of equal protection.

IV

We find, therefore, that section 3(h)(6) was properly applied to deny dual benefits to the petitioners in this case, and that the section does not violate the Fifth Amendment. Accordingly, the decisions of the Railroad Retirement Board denying dual benefits to Frock and Stribling are AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

REGISTERED MAIL
Return receipt requested

July 27, 1981

Mr. Charles L. Stribling
1314 Creswell Street
Waycross, Georgia 31501

In reply refer to.
R.R.B. No. A-718-12-4337

Dear Mr. Stribling:

There is enclosed a copy of the decision of the Railroad Retirement Board on your application for benefits under the Railroad Retirement Act. The Board regrets that the circumstances in your case afford it no alternative to the conclusions reached in its decision.

Very truly yours,

R. F. Butler
Secretary of the Board

Enclosure

cc: Mr. Newton G. McCoy
Friedman Weitzman & Friedman
Attorneys at Law
The Advocate Buidling
1133 Pine Street
St. Louis, Missouri 63101

District Office
Jacksonville, Florida

RFB:ps

THIS FORM IS TO BE USED ONLY BY THE SECRETARY OF THE BOARD OR AS OTHERWISE SPECIFICALLY DIRECTED BY THE BOARD.	FORM NO. G-31 UNITED STATES OF AMERICA RAILROAD RETIREMENT BOARD TRANSCRIPT OF BOARD ORDERS	TRANSCRIPT NO. Special PAGE 1 OF 1 PAGES DATE TRANSCRIPT RELEASED

I CERTIFY THAT THE FOLLOWING IS A TRUE AND CORRECT TRANSCRIPT OF BOARD ORDER(S) NUMBERED 81-75, TRANSCRIBED FROM THE RECORD OF PROCEEDINGS OF August 18, 1981

R. L. Butler
SECRETARY OF THE BOARD

B.O. 81-75

DECISION IN RAILROAD RETIREMENT ACT CLAIMS APPEAL DOCKET NO. 1894, CHARLES L. STRIBLING, R.R.B. NO. A-718-12-4337

Each member of the Board having reported that he had examined the record in the appeal of Charles L. Stribling from the decision of the appeals referee and had considered the evidence and argument presented therein,

the Board unanimously renders the decision set forth in the opinion of the Board, RAILROAD RETIREMENT ACT CLAIMS APPEAL DOCKET NO. 1894, CHARLES L. STRIBLING, R.R.B. NO. A-718-12-4337, affirming the decision of the appeals referee.

RAILROAD RETIREMENT BOARD

Appeal of	)	Railroad Retirement Act Claims
Charles Stribling	)	Appeal Docket
R.R.B. No. A-718-12-4377	)	No. 1894

This appeal involves the correctness of certain computational procedures used in determining the amount of appellant's annuity under the provisions of the Railroad Retirement Act of 1974.

Under that Act, annuities are comprised of two tiers and, in certain cases, a dual benefit windfall. At issue here is whether the husband's benefit being received by Mr. Stribling under the Social Security Act should have been deducted from the First tier of his railroad retirement annuity. Also, whether he is entitled to a windfall component.

Tier I is based on the employee's railroad service and social security earnings, if any, and uses the Social Security Act formula. Section 3(m) of the 1974 Act states that the first tier of an employee annuity shall be reduced by the amount of any monthly benefit payable to the annuitant under title II of the Social Security Act. The use of the term "any" plainly requires that the reduction be made whether the social security benefit is derived from or based on the earnings of a spouse or anyone else. Appellant became entitled to a husband's benefit under title II of the Social Security Act effective August 1, 1977, as a result of the holding of the U.S. Supreme Court in Califano v. Goldfarb, 430 U.S. 199 (1977) that the dependency requirement imposed by the Act for that benefit was discriminatory and unconstitutional. The Board finds that the amount of that benefit was properly deducted from appellant's first tier.

Employees who meet one of the vesting requirements of Section 3(h) are entitled to a windfall component which was intended to replace or partially to replace the reduction for social security entitlement in tier I. The Board's General Counsel previously considered the question of the windfall entitlement of individuals such as appellant, and issued an opinion on April 14, 1977, L-77-256 (Exhibit I). The Board approved and adopted that opinion and declines to follow the decision reached in Gebbie v. United States Railroad Retirement Board, 631 F.2d 512 (7th Cir. 1980), referred to by appellant's attorney. The Board finds that appellant is not entitled to a windfall component.

Railroad Retirement Act	R.R.B. No.
Claims Appeal Docket	A-718-12-4337
No. 1894	Charles Stribling

DECISION

The decision of the appeals referee is affirmed.

/s/ William P. Adams
WILLIAM P. ADAMS, Chairman

/s/ C. J. Chamberlain
C. J. CHAMBERLAIN, Member

/s/ Earl Oliver
EARL OLIVER, Member

Ex. 1
April 14, 1977

L-77-256
M-20

Director of Retirement Claims

General Counsel

Application of sections 3(h)(3) and 3(h)(4) with respect to male annuitants entitled to husbands' or widowers' benefits under the Social Security Act

The United States Supreme Court recently held that the dependency requirements imposed on husbands and widowers under the Social Security Act are unconstitutional. As a result, men who otherwise qualify for husbands' or widowers' benefits under the Social Security Act may receive such benefits regardless of dependency. A question has arisen regarding the effect of receipt of a husband's or widower's benefit under the Social Security Act on the computation of an

employee age and service annuity which might be payable to the beneficiary under the Railroad Retirement Act of 1974.

Employee annuities are computed as provided in section 3 of the Railroad Retirement Act of 1974 (45 U.S.C. section 231b), and are comprised of various benefit components including the social security level component, the staff component and, in certain instances, the windfall component.

The social security level component calculated under section 3(a)(1) of the Act is an amount equal to the benefit to which the individual would have been entitled under the Social Security Act had all his employment after 1936 been covered by the Social Security Act. The social security level component is then reduced pursuant to section 3(m) of the Act by the amount of <u>any</u> benefit which the individual receives under Title II of the Social Security Act. The amount of the reduction,

or a portion of that amount, may be restored to the individual under section 3(h) of the Act as the windfall component of his benefit if he meets the requirements imposed with respect to that component.

The amount of the social security level component of an individual's railroad retirement annuity would be reduced under section 3(m) of the Railroad Retriement Act by the amount of a husband's or widower's benefit payable to the individual under the Social Security Act. Thus, in the case of an individual newly entitled to a husband's or widower's benefit under the Social Security Act who is also entitled to an employee annuity under the Railroad Retirement Act, the social security level component of his annuity will be reduced by the amount of the social security benefit which he receives. The question then becomes whether a windfall component would be payable in the case of such an individual.

Sections 3(h)(3) and 3(h)(4) of the Railroad Retirement Act of 1974 make provision for the addition of a windfall component to the amount of the annuity payable to an employee where the social security level component of the annuity had been reduced by reason of entitlement to a spouse's, widow's, or widower's benefit under the Social Security Act. Sections 3(h)(3) and 3(h)(4) of the Railroad Retirement Act provide as follows:

> "(3) The amount of the annuity provided under subsections (a) through (d) of this section of an individual who * * * is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act on December 31, 1974, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or

widower's insurance benefit to which such individual would have been entitled, upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act prior to

January 1, 1975, and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment' as defined in that Act.

"(4) The amount of the annuity provided under subsections (a) through (d) of this section of an individual who * * * is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act as of December 31 of the calendar year prior to 1975 in which such individual last rendered service as an employee to an employer, or as an employee representative, shall be increased by an

amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such individual would have been entitled, upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this Act or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security

Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this Act and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment' as defined in that Act." (Emphasis added.)

As can be seen from the above, sections 3(h)(3) and 3(h)(4) provide that the amount of the windfall component payable to an otherwise qualified individual shall be the smaller of the spouse's, widow's, or widower's

benefit to which the individual would have been entitled as of some previous date under the provisions of the Social Security Act as in effect on December 31, 1974, or the primary insurance amount to which such individual would have been entitled had all his employment between 1937 and 1975 been covered by the Social Security Act. Under the provisions of the Social Security Act actually in effect on December 31, 1974, the husband or widower of a female employee was entitled to a spouse's or widower's benefit only if he could prove that he was dependent on his spouse for a stated percentage of his support. 42 U.S.C. sections 402(c) and 402 (f). Thus, a windfall benefit under sections 3(h)(3) and 3(h)(4) would only be payable to a husband or a widower of a female social security employee where such husband or widower is able to prove dependency on his spouse as required by the Social Security

Act as in effect on December 31, 1974. No windfall would be payable to the husband or widower of a female social security employee who would not have been entitled to a husband's or widower's benefit under the provisions of the Social Security Act actually in effect in 1974.

It is my opinion that sections 3(h)(3) and 3(h)(4) of the Railroad Retirement Act should be applied as they read, and that no windfall component should be payable to an individual whose employee annuity may be reduced by reason of entitlement to a social security husband's or widower's benefit where such individual would not have been entitled to such a benefit under the Social Security Act as actually in effect in 1974. While this opinion might be questioned as, in effect, applying the now unconstitutional dependency requirement contained in the Social Security Act as in effect on December 31, 1974,

to reduce the railroad retirement benefit payable to a male annuitant, it is my opinion that sections 3(h)(3) and 3(h)(4) as so applied would not violate the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

The result achieved by applying sections 3(h)(3) and 3(h)(4) of the Railroad Retirement Act to deny a windfall benefit to individuals who would not have been entitled to any secondary benefits under the Social Security Act as in effect in 1974 is precisely the result sought by those sections and the other sections of the Railroad Retirement Act of 1974 which provide for windfall payments. The legislative history of Public Law 93-445 (the Railroad Retirement Act of 1974) clearly shows that one of the primary goals of the enactment of that Public Law was to abrogate entitlement to dual benefits under both the Rail-

road Retirement Act and the Social Security Act. See e.g., H.R. Rep. No. 93-1345, 93rd Cong., 2d sess. II (1974). Congress provided for the payment of a windfall dual benefit component only to restore dual benefits for thos7 persons who had a "vested" status with respect to benefits under both programs and who had placed reliance on receipt of benefits under both programs. Id. For those persons who did not have "vested" status under both programs, dual benefits were eliminated. Thus, individuals who had no expectations as to dual benefit entitlement at the time the 1974 Act became effective, such as non-dependent husbands and widowers, were precisely the individuals Congress intended to place outside the parameters of dual benefit protection.

Social security and railroad retirement benefits are not matters of fundamental interest or right. Ruhl v. Railroad Retirement Board,

342 F.2d 662 (C.A. 7, 1965); Richardson v. Belcher, 404 U.S. 78 (1971); and Flemming v. Nestor, 363 U.S. 603 (1960). Congress, in enacting legislation with respect to such benefits, is afforded a greater degree of latitude in imposing requirements or conditions for entitlement to those benefits than would be true were they contractual or matters of fundamental interest or right. A statutory provision which provides for the payment of social insurance benefits and which does not involve an "inherently suspect" classification comports with the requirements of the Due Process Clause so long as the provision is reasonable in terms of the remedy or goal sought to be achieved. The Court in the case of Ruhl v. Railroad Retirement Board, 342 F.2d 662, 666 (C.A. 7, 1965) stated the standard or test to be applied with respect to railroad retirement benefits as follows:

"* * * No previously vested right was disturbed by the provisions. * * * They have a reasonable basis in the light of the problems to be remedied and the purpose and object of the legislation. They do not unreasonably or arbitrarily discriminate and thereby offend the requirements of due process."

The action of Congress in enacting sections 3(h)(3) and 3(h)(4) to provide for the payment of a windfall benefit only to those individuals who had a "vested" status in and reasonable expectations to the receipt of benefits under both the Railroad Retirement Act and the Social Security Act was reasonable in view of the need to protect the financial condition of the railroad retirement program. Thus, the application of those sections to deny the payment of a windfall component

to an employee-annuitant who is entitled to a secondary benefit under the Social Security Act, but who would not have been so entitled under the Social Security Act, but who would not have been so entitled under the Social Security Act as actually in effect on December 31, 1974, comports with the Due Process Clause of the Fifth Amendment to the United States Constitution.

Dale G. Zimmerman
General Counsel

45 U.S.C. Section 231b(h)(3)

The amount of the annuity provided under subsections (a) and (b) of this section of an individual who (A) will have (i) rendered service as an employee to an employer, or as an employee representative, during the calendar year 1974, or (ii) had a current connection with the railroad industry on December 31, 1974, or at the time his annuity under section 231a(a)(1) of this title began to accrue, or (iii) completed twenty-five years of service prior to January 1, 1975, and (B) will have completed ten years of service prior to January 1, 1975, and is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act on December 31, 1974, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such

individual would have been entitled, upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act prior to January 1, 1975, and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

45 U.S.C. Section 231b(h)(4)

The amount of the annuity provided under subsections (a) and (b) of this section of an individual who (A) will not have met the conditions set forth in subclause (i), (ii), or (iii) of clause (A) of subdivision (3) of this subsection, but (B) will have completed ten years of service prior to January 1, 1975, and is the wife, husband, widow, or widower of a person who will have been permanently insured under the Social Security Act as of December 31 of the calendar year prior to 1975 in which such individual last rendered service as an employee to an employer, or as an employee representative, shall be increased by an amount equal to the smaller of (C) the wife's, husband's, widow's, or widower's insurance benefit to which such

individual would have been entitled, upon attaining age 65 (or, if later, for January 1975) under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such person's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this subchapter or (D) the primary insurance amount to which such individual would have been entitled upon attaining age 65 (or, if later, for January 1975), under the provisions of the Social Security Act as in effect on December 31, 1974, on the basis of such individual's wages and self-employment income derived from employment and self-employment under that Act as of December 31 of the calendar year prior to 1975 in which such individual last performed service as an employee under this sub-

chapter and on the basis of compensation derived from service as an employee after December 31, 1936, and prior to January 1, 1975, if such service as an employee had been included in the term "employment" as defined in that Act.

45 U.S.C. Section 231b(h)(6)

(6) No amount shall be payable to an individual under subdivision (3) or (4) of this subsection unless the entitlement of such individual to such amount had been determined prior to August 13, 1981.

45 U.S.C. Section 231b(m)

The annuity of any individual under subsection (a) of this section for any month shall, after any reduction pursuant to paragrpah (iii) of section 231a(a)(1) of this title, be reduced, but not below zero, by the amount of any monthly benefit (before any deductions on account of work) payable to that individual for that month under title II of the Social Security Act.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

CLINTON T. FROCK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 81-2187
	)	
UNITED STATES RAILROAD RETIREMENT BOARD,	)	
	)	
	)	
Respondent.	)	

MOTION FOR SUBSTITUTION OF PARTIES

Comes now the Petitioner who requests this Court to order a substitution of parties for the following reasons under F.R.A.P. 43(a):

1. Clinton Frock died while this proceeding was pending before this Court.

2. This case is still before this Court.

3. Doretta Frock is his widow.

4. Doretta Frock desires to continue this action as his personal representative.

WHEREFORE, for the reasons stated, Petitioner requests that the Court order the substitution of Mrs. Doretta Frock for Mr. Clinton Frock, deceased, in this proceeding.

Douglas I. Friedman
Attorney for Petitioner
555 Bank for Savings Bldg.
Birmingham, Alabama 35203
Telephone (205) 326-3033

Supreme Court, U.S.
FILED
JAN 14 1983
ALEXANDER L. STEVAS
CLERK

No. 82-756

In the Supreme Court of the United States

OCTOBER TERM, 1982

ESTATE OF CLINTON T. FROCK, ET AL., PETITIONERS

v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-756

ESTATE OF CLINTON T. FROCK, ET AL., PETITIONERS

v.

UNITED STATES RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners challenge the constitutionality of Section 3(h)(6) of the Railroad Retirement Act of 1974, Pub. L. No. 97-35, Section 1118(e)(3), 95 Stat. 6321, to be codified at 45 U.S.C. 231b(h)(6), which prohibits the payment of so-called "windfall" or "dual" benefits[1] under the Act except where entitlement to those benefits was "determined prior to August 13, 1981," the date on which Section 3(h)(6) was enacted.

1. Before 1974, individuals fully insured under the Railroad Retirement System and the Social Security System were entitled to benefits under both. The Railroad Retirement Act of 1974 established a system for phasing out this practice. See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980) (holding that phase out did not

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[1]See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 169-170 (1980).

violate equal protection). Under that Act, a worker or dependent was eligible for dual benefits only if he or she "would have been entitled" to Social Security benefits "under the provisions of the Social Security Act as in effect on December 31, 1974" (45 U.S.C. 231b(h)(3) and (4)).

Application of this phase-out scheme was made more complicated by this Court's decision in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), which held that the Fifth Amendment was violated by a provision in the Social Security Act requiring husbands, but not wives, to prove dependency on their insured spouses in order to receive spousal Social Security benefits. Following *Goldfarb*, the Railroad Retirement Board was required to decide whether railroad retirees were entitled to dual benefits if they were not entitled to Social Security benefits under the law as interpreted as of December 31, 1974, but were entitled to such benefits under *Goldfarb*. The Board concluded that such individuals were not entitled to dual benefits, but in *Gebbie* v. *United States Railroad Retirement Board*, 631 F.2d 512 (7th Cir. 1980), the Seventh Circuit reached the opposite conclusion as a matter of statutory construction (see *id.* at 516). However, the *Gebbie* court refused to certify that case as a class action (*id.* at 516 n.9), and therefore its decision was binding only with respect to the three retirees who initiated that action. The Board did not acquiesce in *Gebbie's* interpretation of the statute.

In response to *Gebbie*, "which threatened to impose significant financial burdens upon the railroad retirement system" (Pet. App. 22-A), Congress enacted Section 3(h)(6), which provides that an individual may not receive dual benefits "unless the entitlement of such individual to such amount had been determined prior to August 13, 1981."[2]

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[2]Congress also addressed the *Gebbie* issue by adding Sections 4(e)(5) and 4(h)(2) of the Act, 45 U.S.C. 231c(e)(5)) and 231c(h)(2), which phase out windfall dual benefits for spouses, widows, and widowers in a

2. Petitioner Stribling and Clinton T. Frock, whose estate has petitioned here, are individuals who would have been entitled to dual benefits under *Gebbie* but whose entitlement to such benefits had not been determined by the Board or any court prior to August 13, 1981. The Board denied their requests for dual benefits, and the court of appeals affirmed, concluding the Section 3(h)(6) barred such payments and is constitutional.[3] The court first rejected petitioners' claim that *Gebbie* had "determined" their entitlement to benefits (Pet. App. 14-A to 19-A). The court noted that Section 3(h)(6) specifically requires an individual determination of entitlement (Pet. App. 15-A) and that *Gebbie* was not a class action (*id.* at 16-A).

Turning to petitioners' constitutional claims, the court found no merit in the argument that Section 3(h)(6) violates due process by conditioning "their right to benefits upon when the Board or a court acts affirmatively upon their

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similar manner to Section 3(h)(6). See H.R. Rep. No. 97-208, 97th Cong., 1st Sess. 862-865 (1981).

[3]In 1968, Clinton Frock began to receive an annuity under the Railroad Retirement Act of 1937. On January 1, 1975, the Railroad Retirement Act of 1937, 45 U.S.C. (1970 ed.) 228a *et seq.*, was replaced by the Railroad Retirement Act of 1974, 45 U.S.C. (& Supp. IV) 231 *et seq.*, and Frock's annuity was converted into an annuity under that statute. Following *Califano* v. *Goldfarb*, *supra*, the Board determined that Frock was not entitled to dual benefits under the provisions of the 1974 Act, and Frock did not seek administrative or judicial review of that determination at that time.

On February 27, 1981, Frock requested a benefit under Section 3(h)(3) in light of the Seventh Circuit's decision in *Gebbie*, which had been handed down nearly four months earlier (Pet. App. 14A). The Board declined to acquiesce in *Gebbie*, and therefore this request was denied (Pet. App. 14A). Frock then filed a petition for review in the Seventh Circuit. He died on August 28, 1982.

Charles Stribling, like Frock, was denied dual benefits. After exhausting administrative remedies, he petitioned for review by the Seventh Circuit.

request for benefits, rather than upon when they became eligible for benefits" (Pet. App. 20A-21A). Stating that the proper test is whether the statute "manifests a patently arbitrary classification, utterly lacking in rational justification" (Pet. App. 21-A, quoting *Califano* v. *Goldfarb, supra*, 430 U.S. at 210, quoting *Fleming* v. *Nestor*, 363 U.S. 603, 611 (1960)), the court observed (Pet. App. 22-A) that "[t]he decision not to revoke the benefits of those who had been determined to be eligible for them was a rational means of recognizing expectations created by court decisions and Board actions," while at the same time protecting the financial stability of the Railroad Retirement System.

Finally, the court held (Pet. App. 24-A) that Section 3(h)(6) does not violate equal protection. Conducting the "twofold inquiry" employed in *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979), the court first determined (Pet. App. 27-A to 29-A) that the classification contained in Section 3(h)(6) is "neutral in the sense that it is not gender based" (442 U.S. at 274). The court then concluded (Pet. App. 30-A to 32-A) that even if that neutral classification worked to the disadvantage of one gender, it did not "reflect[] invidious gender-based discrimination" (442 U.S. at 274). "[T]he legislative history is clear that Congress passed Section 3(h)(6), not in an attempt to discriminate against anyone on the basis of sex, but rather in an attempt to forestall bankruptcy of the railroad retirement system by eliminating dual benefits for both men and women" (Pet. App. 31-A).

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Moreover, the decision below will not cause undue hardship or deprive anyone of benefits currently being received; instead, it merely prevents certain individuals from obtaining future "dual" or "windfall" benefits. Finally, the decision is of minimal continuing

importance, because Section 3(h)(6) plainly forecloses the payment of dual benefits to persons who did not even apply for them prior to August 13, 1981. Accordingly, further review by this Court is not warranted.

a. Petitioners contend (Pet. 15-26) that the decision below conflicts with *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), but there is little similarity between *Logan* and the present case. In *Logan*, an employee allegedly discharged because of a physical handicap unrelated to ability filed a timely complaint of discrimination with the Illinois Fair Employment Practices Commission, as he was required to do by state law, but the Commission failed to convene a factfinding conference within the period prescribed by statute. The Supreme Court of Illinois held that the Commission was accordingly deprived of jurisdiction to adjudicate the complaint and that the former employee was unable to obtain administrative or judicial review of his discrimination complaint. The court rejected the former employee's claim that his due process rights would be violated if the Commission's error were permitted in effect to extinguish his cause of action. This Court reversed, holding that the right to use the Commission's adjudicatory procedures was a species of property protected by the Due Process Clause and that the former employee had been denied an opportunity for an appropriate hearing on the merits of his complaint " 'at a meaningful time and in a meaningful manner' " (455 U.S. at 437, quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)).

The critical difference between *Logan* and the present case is manifest. In *Logan*, an individual's cause of action was extinguished for no valid reason but simply because the state authorities had erred. Here, by contrast, Congress proceeded rationally when it decided to phase out dual benefits and chose a date by which all claims to such benefits would have to be determined. The cut-off date chosen by

Congress undoubtedly produced unfortunate results for those persons who did not become eligible for dual benefits until shortly before the cut-off and thus were unable to prosecute their claims to a successful conclusion in time. The same result would occur, however, no matter what date Congress chose.[4]

Petitioners do not dispute that "railroad benefits, like social security benefits, are not contractual and may be altered or even eliminated at any time." *United States Railroad Retirement Board* v. *Fritz, supra,* 449 U.S. at 174. See *Logan* v. *Zimmerman Brush Co., supra,* 455 U.S. at 432-433. Instead, they suggest (Pet. 15) that, rather than denying benefits to those whose entitlement was not determined by a certain date, Congress should either have "eliminated dual benefits altogether" or "limited them to individuals already receiving them." But Congress surely did not act unconstitutionally in concluding that both of those options would have produced results at least as harsh as those under the plan it chose. Eliminating dual benefits altogether would have worked a hardship upon those who were already receiving such benefits and had come to depend upon them. Limiting dual benefits to those receiving them as of a particular date would have produced unfortunate results for persons who otherwise would have begun receiving benefits shortly after the cut off. Similarly, if Congress had provided for the denial of benefits to anyone who had not *become eligible* by a certain date (rather than anyone not *determined to be eligible*), there would have been unpleasant consequences for those who became eligible not long after

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[4]Here, unlike in *Logan*, "there is no procedure which the petitioners claim was denied them. Rather, the petitioners object that a procedure was required before benefits would vest" (Pet. App. 23-A). Moreover, "petitioners do not claim that the Board deliberately delayed action on their applications in anticipation of the passage of Section 3(h)(6)." Pet. App. 23-A n.13.

the critical date. In short, closing the ranks of persons eligible to receive benefits usually means that certain individuals, through no fault of their own, will just miss the cut off. It does not follow, however, that those persons are denied due process. If that were the case, closing the category of persons participating in any benefit program would become extermely difficult, if not impossible.[5]

b. Petitioners also claim (Pet. 26-34) that Section 3(h)(6) violates the equal protection component of the Fifth Amendment in that it creates a gender-based classification. This argument lacks merit. Certainly Section 3(h)(6) does not contain any express gender-based classification. It simply establishes a cut-off date for determining entitlement to dual benefits, and that date is equally applicable to men and women. Because Section 3(h)(6) does not contain any express gender-based classification, the court below correctly turned to the analysis employed in *Personnel Administrator* v. *Feeney, supra.* Under that analysis, "[t]he first question is whether the statut[e] * * * is indeed neutral in the sense that it is not gender-based" (442 U.S. at 274). If there is no gender-based classification, whether "covert or overt," the next question is whether any adverse effect upon one gender or the other is the product of "purposeful discrimination" (*ibid.*).

Here, the court of appeals correctly concluded (Pet. App. 27-A to 30-A) that Section 3(h)(6) does not contain a covert gender-based classification. As the court below noted (Pet. App. 29-A to 30-A):

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[5]Petitioners argued below and suggest here (see Pet. 17-21) that their entitlement to dual benefits was conclusively established in *Gebbie* and that the Board was bound to follow *Gebbie* in all future cases. However, the *Gebbie* court pointedly refused to certify that case as a class action (see 631 F.2d at 516 n.9), thus emphasizing that it was binding only with respect to the individual litigants. See also Pet. App. 18-A to 19-A.

> [S]ection 3(h)(6) cannot rationally be explained as an effort to discriminate on the basis of gender. The class of persons excluded from dual benefits under this section will be composed of men and women. Similarly, the class of persons who will receive benefits will be composed of men and women.

In addition, the court of appeals correctly held that Section 3(h)(6) was not enacted for an invidious gender-based purpose. Rather, the legislative history shows that the statute was passed to protect the financial stability of the Railroad Retirement Fund[6] without eliminating dual benefits of persons who had come to rely upon those benefits either because they were already receiving them or because their right to receive them had been determined. See *United States Railroad Retirement Board* v. *Fritz*, *supra*, 449 U.S. at 169 n.2; S. Rep. No. 93-1163, 93d Cong., 2d Sess. 4 (1974).

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[6]Petitioners contend (Pet. 20-21) that fiscal concerns were not relevant in enacting Section 3(h)(6). They point to Section 15(d) of the Act, 45 U.S.C. 231n(d), which allows Congress to put a cap on dual payments by limiting the amount payable in any fiscal year to the amount appropriated. Under Section 7(c)(1) of the Act, 45 U.S.C. 231f(c)(1), in any fiscal year in which the amount of the appropriations does not equal the amount that must be paid out under the dual benefit sections of the Railroad Retirement Act, the Board must proportionately reduce the dual benefits payable in that year. For fiscal year 1982, for example, windfalls were paid at 88% of the full amount. Petitioners fail to appreciate that the greater the number of beneficiaries of windfalls, the more likely is the possibility that the amount of dual payments per beneficiary will have to be reduced. In enacting Section 3(h)(6) and its companion sections, Congress was phasing out dual benefits for certain groups of individuals, *i.e.*, (1) employees receiving windfalls based upon their spouse's earnings; (2) spouses of employees; and (3) widows or widowers of employees. By this action, Congress helped to ensure that the individuals still entitled to dual benefits would receive full payment. Moreover, by limiting the class of persons entitled to windfall benefits, Congress increased the likelihood that the appropriations for such benefits would not always be exhausted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1983

Office-Supreme Court, U.S.
FILED
FEB 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-756

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

ESTATE OF CLINTON T. FROCK, deceased; and CHARLES L. STRIBLING,

Petitioners,

vs.

UNITED STATES RAILROAD RETIREMENT BOARD,

Respondent.

REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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1. Respondent makes two contentions which are misleading or inaccurate.

First, it borders on the disingenuous to assert that section 3(h)(6) "produced unfortunate results for those persons who did not become eligible for dual benefits

until shortly before the cut-off and thus were unable to prosecute their claims to a successful conclusion in time." (Resp. 6) As respondent well knows, the majority of those affected were eligible long before the cut-off date; they were harmed not by the timing of §3(h)(6), but by the Board's ongoing refusal to determine their existing eligibility. Most of the estimated 20,000 to 50,000 so affected were, by definition, previously eligible for dual benefits pursuant to §§3(h)(3) or (4) of the Act. Most had already retired by the date on which this Court decided the Goldfarb cases (March, 1977), and thus were eligible from the start for dual benefits. The effect of the cut-off date was not to frustrate a few unfortunates who were unable to "prosecute their claims to a successful conclusion," but to protect the Board from the inevitable decision which would force it to apply the correct (Gebbie) interpretation of §§3(h)(3) and (4) to everyone in that circumstance.

That difference defines the significance of this case, and distinguishes it from those cases where an arbitrary date

is used to restrict eligibility. The issue here is not the use of a deadline, but, rather, the refusal of the Board to act in accordance with its statutory obligations to process claims and determine eligibility. It is not the bad luck of a few who ran out of time which describes the due process violation, but the Board's refusal to respond to the claims of thousands.[1/]

1/ Respondent is wrong, therefore, to deny the applicability of Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982), to this situation (Resp. 5-6). The Board describes Logan as involving the extinction of a "cause of action ... for no valid reason but simply because the state authorities had erred." (Resp. 5) Here, the right to benefits was also extinguished for no valid reason -- and in a considerably more distasteful manner: the responsible agency intentionally declined to comply with the law, and then, retroactively, that behavior was validated. In both instances, the claimants were entitled to a procedure which was denied them solely because of the unconscionable behavior of the agencies. Logan describes a remarkably similar scenario, differing primarily in that it concerned negligence affecting one individual rather than the purposeful and unlawful deprivation of thousands.

This is not an instance in which Congress chose between various options producing equally unpalatable results (Resp. 6), but one where Congress selected the only option which was intended to negate long-existing eligibility. The recognized propriety of cut-off dates to define eligibility has no relevance to a situation where the cut-off date institutionalizes an agency's express refusal to comply with its statutory and constitutional obligations.

Secondly, respondent's statement that §3(h)(6) "plainly forecloses the payment of dual benefits to persons who did not even apply for them prior to August 13, 1981" is inaccurate. Claimants do not apply for dual benefits. They apply for all benefits to which they are entitled, and it is the Board's obligation to make the appropriate determinations of eligibility. 45 U.S.C. §231f(b)(1), (3). Most of those affected by §3(h)(6) were already receiving benefits when the Board reduced them because of their receipt of Social Security spousal benefits, see 45 U.S.C. §231b(m), and improperly refused to

reinstate those benefits pursuant to §3(h)(3) or (4). Thus, there was no additional application to be filed.

There may be some men who, though retired, never filed an application, and there were others who had not retired by August 13, 1981 and consequently had not filed an application by that date, but these were relatively few and were not the target of §3(h)(6). The target were the thousands of men who had retired, who had filed applications for benefits, and who had satisfied the vesting requirements of §3(h)(3) or (4) by the relevant date, January 1, 1975.

Consequently, to state that "the decision [below] is of minimal continuing importance" (Resp. 4-5) belittles not only the extraordinary action of the Board and the Congress, but ignores the significance of additional monthly benefits to thousands of men living on fixed incomes. See United States Railroad Retirement Board v. Fritz, 101 S.Ct. 453, 470 (1980) (Brennan, J., dissenting).

2. Two points not raised by respondent, but relevant to the consideration of the petition, also require brief discussion.

First, the Seventh Circuit has recently held that the district courts have no jurisdiction over claims brought under the Railroad Retirement Act. Denberg v. United States Railroad Retirement Board, No. 81-2386 (7th Cir., Jan. 4, 1983). Consequently, the court below in this case was wrong in suggesting that the Gebbie analysis could have been applied to a class through a district court action. See Pet.App. 16-A to 17-A n.7.

Secondly, a challenge identical to that in Frock is now pending in the Court of Appeals for the District of Columbia Circuit. Givens v. United States Railroad Retirement Board, Nos. 82-2183, -2184, -2185, -2312, -2313. Pursuant to 45 U.S.C. §231g, three individuals filed petitions for review on October 1, 1982, and two more filed on November 2, 1982. The five petitions for review were consolidated. Three of the petitioners (Nos. 82-2183 through -2185) have moved to represent a class of all those similarly situated. Petitioners'

opening brief was filed on December 20, 1982, and respondent's brief was filed on January 27, 1983. The clerk's office of the Court of Appeals has informed counsel for petitioners that oral argument will probably be heard in April or early May, 1983.

Respectfully submitted,

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DATED: February, 1983.